NO. COA06-927

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v. Yadkin County
No. 05 CRS 51047

LEWIS DEAN LOWE

Appeal by defendant from judgment entered 28 March 2006 by Judge Catherine C. Eagles in Yadkin County Superior Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Marc Bernstein, for the State.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Jay Vannoy and Daniel S. Johnson for the defendant appellant.

McCULLOUGH, Judge.

On 23 January 2006, defendant, Lewis Dean Lowe, was indicted for resisting a public officer; possession of a controlled substance (marijuana); possession of a controlled substance with the intent to manufacture, sell or deliver (methamphetamine); trafficking by possession of between 200 and 400 grams of methamphetamine; misdemeanor possession of drug paraphernalia; and maintaining a dwelling for keeping and selling a controlled substance (methamphetamine and marijuana).

On 19 January 2006, defendant moved to suppress certain physical evidence and statements made by defendant. Following a hearing on 27 March 2006, the trial court denied the motion as to all physical evidence and deferred the motion as to the statements made by defendant based on the State's representation that it did not intend to offer the statements at trial. Upon the denial of the motion to suppress, defendant pled guilty to one count of trafficking of methamphetamine. Pursuant to a plea agreement, the remaining charges were dismissed and defendant preserved his right to appeal the denial of his motion to suppress. The trial court sentenced defendant to a minimum of seventy months and a maximum of eighty-four months in prison. Defendant now appeals the trial court's denial of his motion to suppress.

Before turning to the merits of defendant's appeal, we must first address the State's contention that the appeal is subject to dismissal by this Court due to defendant's failure to include in his brief the standard of review for the assignments of error he raises. Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure provides that "[t]he argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented." N.C. R. App. P. 28(b)(6) (2006). Rule 28(b)(6) further requires that "the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant

relies." *Id.* Here, defendant has failed to include any reference to the standard of review applicable to the trial court's ruling on the motion to suppress.

This Court has the authority to dismiss an appeal for failure to comply with the Rules of Appellate Procedure. N.C. R. App. P. 25(b) (2006); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (per curiam) (holding that the rules of appellate procedure are mandatory), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Nevertheless, this Court has reserved dismissal as a penalty for more substantial violations. *See Stann v. Levine*, __ N.C. App. __, __, 636 S.E.2d 214, 217 (2006) ("When **viewed** *in toto*, the nature and number of rules violations, combined with the absence of any compelling justification for suspending the rules pursuant to Rule 2, justifies dismissal of plaintiff's appeal."). Because defendant's sole error is not substantial, we decline to impose dismissal as a sanction.

The dispositive issue on appeal is whether the trial court erroneously found that the police had lawful consent to enter defendant's hotel room. In an appeal from a ruling on a motion to suppress, this Court is required to treat the trial court's findings of fact as conclusive if supported by competent evidence, even if the evidence is conflicting. *State v. Mahatha*, 157 N.C. App. 183, 191, 578 S.E.2d 617, 622 (2003), *disc. review denied*, 357 N.C. 466, 586 S.E.2d 773. However, the trial court's conclusions of law are subject to a full review by this Court. *Id.*

Evidence presented by the State at the suppression hearing tended to show that at approximately 3:30 a.m. on 7 August 2004, Deputies Jason Vestal and James Robison of the Yadkin County Sheriff's Department went to the Country Inn in Jonesville, North Carolina to investigate a report of possible prostitution at the hotel. Approximately five minutes after their arrival, the deputies observed a woman exit one of the hotel rooms, exclaim, "Oh, shit," and then retreat back into the room slamming the door.

Based on this observation, the deputies proceeded to the room to determine whether there was a domestic disturbance occurring in the room. After the deputies knocked on the door, Amy Dawn Caldwell opened the door and stood in the doorway. After identifying themselves, the deputies asked Ms. Caldwell if everything was okay. Ms. Caldwell indicated that everything was fine. Through the open door, the deputies were able to observe another female and a male lying on a bed in the room. Deputy Vestal then asked Ms. Caldwell if he could talk to her. She responded, "Yes," and then turned and walked into the room. The deputies, concluding that this was an invitation to follow her, entered the room behind her. Shortly thereafter, defendant emerged from the bathroom at the same time that Deputy Vestal noticed drug paraphernalia on the bathroom sink. Based on this observation, the deputies proceeded to question the occupants of the hotel room. The investigation that followed resulted in the discovery of controlled substances in the hotel room and on defendant's person and in the subsequent arrest of defendant.

Based upon this evidence, the trial court found that the officers had been given consent to enter the hotel room. We agree. Warrantless searches generally are not allowed absent probable cause and exigent circumstances. *State v. Harris*, 145 N.C. App. 570, 580-81, 551 S.E.2d 499, 506 (2001), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002). However, lawful consent to the search is an exception to the warrant requirement. *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997). Further, N.C. Gen. Stat. § 15A-221(a) expressly authorizes warrantless searches and seizures "if consent to the search is given." N.C. Gen. Stat. § 15A-221(a) (2005). This statute defines "consent" as "a statement to the officer, made voluntarily . . . , giving the officer permission to make a search." N.C. Gen. Stat. § 15A-221(b). This Court has further held that "the use of nonverbal conduct intended to connote an assertion is sufficient to constitute a statement" within the meaning of consent under N.C. Gen. Stat. § 15A-221(b). *State v. Graham*, 149 N.C. App. 215, 219, 562 S.E.2d 286, 288 (2002), *appeal dismissed, disc. review denied*, 356 N.C. 685, 578 S.E.2d 315 (2003).

Defendant asserts that the deputies were not given consent to enter the room. Specifically, he contends that none of the hotel room occupants said anything to invite the deputies in and that Ms. Caldwell's movement back into the hotel room was insufficient to imply consent. In support of his argument, defendant cites *U.S. v. Miller* in which a federal district court found lack of consent where the defendant had stepped back inside his apartment with the

door open. *U.S. v. Miller*, 933 F. Supp. 501 (M.D.N.C. 1996). We disagree that *Miller* is dispositive of this case.

In *Miller*, the defendant specifically informed the police officers that he had not invited them into his apartment, verbally objected to officers' presence, expressed his desire to be left alone, and became disruptive during the search. *Id.* at 506. These additional circumstances support the district court's finding in that case that the defendant's movement back into his dwelling did not constitute an implied consent for the officers to enter.

In the case *sub judice*, the movement of Ms. Caldwell back into the hotel room followed her express agreement to speak further with the officers. In addition, there is no evidence that any of the occupants of the hotel room objected to the deputies entry into the room. We conclude that this evidence is competent to support the trial court's finding that the deputies had consent to enter the hotel room. *See State v. Harper*, 158 N.C. App. 595, 582 S.E.2d 62, *appeal dismissed, disc. review denied*, 357 N.C. 509, 588 S.E.2d 372 (2003) (holding that evidence supported consent where defendant, upon being asked by officer if officer could step into room, stepped back from threshold of door, opened door to its full extension, said nothing, and cooperated with officers). Accordingly, defendant's assignment of error is overruled.

Because we have affirmed the trial court's finding of consent for the search, we need not address defendant's additional assignment of error.

No error.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).